

# Property, Civil Forfeiture and the *Charter*

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M A R K S O O \*

## ABSTRACT

This paper seeks to address the issue of how evidence obtained in violation of a *Charter*-protected right is to be dealt with in civil forfeiture proceedings. In arriving at the answer, the governing jurisprudence in this area of the law will be canvassed to provide a contextual background that informs the parameters of this discussion. However, it will ultimately become clear by the end of this paper that evidence obtained in violation of a *Charter*-protected right should be dealt with by way of section 24(2) of the *Constitution Act, 1982*, and the use of a modified *Grant* test.

Civil forfeiture is the process by which the state commences legal action to obtain property that was seized as an instrument or proceed of unlawful activity. Although property can be forfeited through a number of different mechanisms, the scope of this paper is limited to forfeiture proceedings commenced by way of civil action under provincial legislation with a focus on British Columbia.

The case law presented in this paper will focus primarily on appellate court decisions from across the country due to the scarce attention this area of the law has received. These cases will highlight the endeavours of litigants who sought to undermine civil forfeiture proceedings through the use of common law principles and the *Charter*. Finally, commentary will be provided on the direction future research in this area of the law should take.

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**Keywords:** Civil forfeiture; The *Charter*; section 24(2); *Grant*; Exclusion; Evidence; Offence-related property.

## I. INTRODUCTION

On March 12, 2013, William Khan Munnue’s civil forfeiture came to an end, and he was ordered by the British Columbia Supreme Court to surrender his home to the state. The Court found Mr. Munne’s home constituted an instrument of unlawful activity after it was determined that the property was used in a marijuana grow operation. As such, he was ordered to forfeit the property to the Director of Civil Forfeiture.<sup>1</sup>

Civil forfeiture is the process by which the state commences civil proceedings *in rem* against property that was seized as an instrument or proceeds of unlawful activity. Although the definition of unlawful activity varies across jurisdictions, it is broadly defined as an act or omission that is an offence under an act of Canada or another Canadian province or territory.<sup>2</sup> However, due to the numerous civil forfeiture statutes across the country, this paper will generally focus on British Columbia’s *Civil Forfeiture Act*.<sup>3</sup>

The civil forfeiture landscape in BC has recently undergone some major developments. First, the BC Legislature passed the *Civil Forfeiture Amendment Act, 2023* on May 11, 2023, in response to the Cullen Commission’s final report.<sup>4</sup> The commission was established by the Lieutenant Governor of BC to inquire into and report on money laundering in the province.<sup>5</sup> One of the Cullen Commission’s key recommendations was to introduce unexplained wealth orders to combat “the accumulation of illicit wealth by organized crime groups and others involved in serious criminal activity.”<sup>6</sup> With the new amendments, the Director of Civil Forfeiture can now seek an unexplained wealth order in relation to properties that it suspects are the proceeds of unlawful activity.<sup>7</sup>

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<sup>1</sup> *British Columbia (Director of Civil Forfeiture) v Kazan*, 2013 BCSC 388 at paras 119-121.

<sup>2</sup> See Appendix A for a comparison of how the terms are defined differently across each jurisdiction.

<sup>3</sup> *Civil Forfeiture Act*, SBC 2005, c 29 [*Civil Forfeiture Act*].

<sup>4</sup> Bill 21, *Civil Forfeiture Amendment Act, 2023*, 4th Sess, 42<sup>nd</sup> Parl, British Columbia, 2023 (assented, May 11, 2023).

<sup>5</sup> *Commission of Inquiry into Money Laundering in British Columbia – Final Report* (Vancouver: Cullen Commission, 2022) at 49.

<sup>6</sup> *Ibid* at 1616, 1618.

<sup>7</sup> *Civil Forfeiture Act*, *supra* note 3, s 11.09.

The effect of the order is to compel the respondent or responsible officer of the impugned property to demonstrate the nature of their interest in the property, as well as how it was acquired, among other things. Failure to comply with the order results in a presumption that the impugned property is the proceeds of unlawful activity.<sup>8</sup> The property can then be forfeited in the usual course of civil proceedings by virtue of the amendments to the *Civil Forfeiture Act*, which now permit an adverse inference to be made against the property.<sup>9</sup>

The second drastic change involves the British Columbia Court of Appeal's decision to uphold the constitutional validity of the "future use" provisions in the *Civil Forfeiture Act*.<sup>10</sup> The "future use" provisions relate to instruments of unlawful activity defined under section 1(b) of the *Civil Forfeiture Act* as "property that is likely to be used to engage in unlawful activity that may (i) result in the acquisition of property or an interest in property, or (ii) cause serious bodily harm to a person."<sup>11</sup> The Director of Civil Forfeiture relied on these provisions to target the clubhouses of the Hells Angels Motorcycle Club.<sup>12</sup> The trial judge found these provisions exceeded their constitutional authority and were *ultra vires* the province.<sup>13</sup> Upon appeal, however, this finding was overturned.<sup>14</sup>

The final development in this area of the law involves a challenge to the "asset tracing" provisions of the *BC Civil Forfeiture Act* in *Director of Civil Forfeiture v McDermid et al.*<sup>15</sup> In that decision, the Applicants successfully argued sections 22.02 and 11.01 of the Act infringed their section 7 and 8 *Charter* rights.<sup>16</sup> However, the Court has not determined whether these provisions can be saved by section 1 yet. Further commentary of this case will be provided below in the course of discussing challenges to civil forfeiture proceedings.

While these recent developments are related to civil forfeiture, the first two developments go beyond the scope of what this paper seeks to achieve. This paper will instead address how the *Charter of Rights and Freedoms*

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<sup>8</sup> *Ibid*, s 19.07(2).

<sup>9</sup> *Ibid*, s 19.09(2).

<sup>10</sup> *British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd*, 2023 BCCA 70 at para 93 [*Angel Acres Recreation*]. Leave to appeal SCC dismissed on October 12, 2023, 2023 CanLII 92310.

<sup>11</sup> *Civil Forfeiture Act*, *supra* note 3, s 1(b).

<sup>12</sup> *British Columbia (Director of Civil Forfeiture) v Angel Acres Recreation and Festival Property Ltd*, 2020 BCSC 880 at para 1295.

<sup>13</sup> *Ibid* at para 1465.

<sup>14</sup> *Angel Acres Recreation*, *supra* note 10.

<sup>15</sup> *Director of Civil Forfeiture v McDermid et al*, 2023 BCSC 2287 [*McDermid*].

<sup>16</sup> *Ibid* at paras 215, 217 and 231.

impacts civil forfeiture proceedings.<sup>17</sup> More specifically, the focus is on how evidence obtained in violation of a *Charter*-protected right should be dealt with in civil forfeiture proceedings. By the end of this paper, it will be clear that the section 24(2) framework outlined in *R v Grant* by the SCC, subject to some modification, should be used in resolving civil forfeiture proceedings when the evidence was unconstitutionally obtained.<sup>18</sup>

To arrive at this conclusion, some context will be necessary to inform the parameters of this discussion. First, the various existing forfeiture regimes will be surveyed to provide foundational knowledge, followed by a discussion of the lack of constitutional protection of property rights. An in-depth discussion of the strategies and tactics employed by defendants of civil forfeiture proceedings will then take place to inform the reader of some of the challenges that have been raised. This will involve canvassing cases from all jurisdictions in Canada due to the little attention this area of the law has received from appellate courts. These cases will set the stage for the main issue this paper is ultimately concerned with.

## II. THE VARIOUS FORFEITURE REGIMES ACROSS CANADA

### A. Provincial Legislation

Civil forfeiture proceedings are structured to operate almost identically across all jurisdictions in Canada. Each Province can initiate the process in one of two ways. First, forfeiture of the proceeds and instruments of unlawful activity can be sought through the commencement of formal civil proceedings in court. This involves launching a civil action *in rem* against the property in question. Consider, for example, section 3 of British Columbia's *Civil Forfeiture Act*, which provides an example of the property the Director may seek forfeiture of.

#### Application for forfeiture order

- 3 (1) The director may apply to the court for an order forfeiting to the government
  - (a) the whole of an interest in property that is proceeds of unlawful activity, or
  - (b) the portion of an interest in property that is proceeds of unlawful activity.
- (2) The director may apply to the court for an order forfeiting to the government property that is an instrument of unlawful activity.<sup>19</sup>

Alternatively, the state may also seek forfeiture by way of administrative means. Like formal proceedings, each Province has legislative provisions

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<sup>17</sup> *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [the *Charter*].

<sup>18</sup> *R v Grant*, 2009 SCC 32 [Grant].

<sup>19</sup> *Civil Forfeiture Act*, *supra* note 3, s. 3.

that permit the Director of Civil Forfeiture to administratively seek forfeiture of property. This can be done as long as it provides the public with sufficient notice. For example, section 14 of British Columbia's *Civil Forfeiture Act* states:

### Part 3.1 – Administrative Forfeiture of Subject Property

...

#### Application of this Part

14.02 (1) This Part applies if

- (a) the director has reason to believe that
  - (i) the whole or a portion of an interest in property, other than real property, is proceeds of unlawful activity, or
  - (ii) property, other than real property, is an instrument of unlawful activity,
- (b) the director has reason to believe that the fair market value of the property referred to in paragraph (a) (i) or (ii) is \$75 000 or less,
- (c) the property referred to in paragraph (a) (i) or (ii) is in British Columbia and is in the possession of a public body, and
- (d) the director has no reason to believe that there are any protected interest holders in relation to that property.<sup>20</sup>

...

#### Notice of forfeiture under this Part

14.04 (3) Notice under subsection (1) (c) must be

- (a) published in a newspaper of general circulation in British Columbia and circulating in or near the area in which the subject property was seized, or
- (b) published in the *Gazette*.<sup>21</sup>

## B. Federal Legislation

While the focus of this paper is on BC's *Civil Forfeiture Act*, the forfeiture provisions of *The Controlled Drugs and Substances Act* ("CDSA") and the *Criminal Code* are noted here to inform the reader's perspective, as the following cases will draw on some provisions of the CDSA and the *Criminal Code*. As such, it is worth highlighting the language of the relevant sections to be discussed. Consider, for example, section 16 of *The Controlled Drugs and Substances Act*, which states:

#### Forfeiture of property

16 (1) Subject to sections 18 to 19.1, if a person is convicted, or discharged under section 730 of the *Criminal Code*, of a designated substance offence and, on application of the Attorney General, the court is satisfied, on a balance of

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<sup>20</sup> *Ibid*, s 14.02.

<sup>21</sup> *Ibid*, s14.03.

probabilities, that non-chemical offence-related property is related to the commission of the offence, the court shall

- (a) if the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province to be disposed of or otherwise dealt with in accordance with the law by the Attorney General or Solicitor General of that province; and
- (b) in any other case, order that the property be forfeited to Her Majesty in right of Canada to be disposed of or otherwise dealt with in accordance with the law by the member of the Queen's Privy Council for Canada that is designated by the Governor in Council for the purposes of this paragraph.<sup>22</sup>

### Property related to other offences

16 (2) Subject to sections 18 to 19.1, if the evidence does not establish to the satisfaction of the court that property in respect of which an order of forfeiture would otherwise be made under subsection (1) is related to the commission of the designated substance offence of which a person is convicted or discharged, but the court is satisfied, beyond a reasonable doubt, that the property is non-chemical offence-related property, the court may make an order of forfeiture under subsection (1) in relation to that property.<sup>23</sup>

Similarly, it is also worth noting the language expressed in section 490 of the *Criminal Code*, which permits the Crown to seek forfeiture of offence-related property.

490.1 (1) Subject to sections 490.3 to 490.41, if a person is convicted, or discharged under section 730, of an indictable offence under this Act or the *Corruption of Foreign Public Officials Act* and, on application of the Attorney General, the court is satisfied, on a balance of probabilities, that offence-related property is related to the commission of the offence, the court shall

- (a) if the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province to be disposed of or otherwise dealt with in accordance with the law by the Attorney General or Solicitor General of that province; and
- (b) in any other case, order that the property be forfeited to Her Majesty in right of Canada to be disposed of or otherwise dealt with in accordance with the law by the member of the Queen's Privy Council for Canada that is designated by the Governor in Council for the purpose of this paragraph.<sup>24</sup>

As the noted legislation above indicates, the state can seek forfeiture of the offence-related property in numerous ways, regardless of the legislative scheme the proceedings are commenced under. Unfortunately for defendants, there is little protection in the way of property rights in Canada

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<sup>22</sup> *Controlled Drugs and Substances Act*, SC 1996, c 19, s 16(1).

<sup>23</sup> *Ibid*, s 16(2).

<sup>24</sup> *Criminal Code*, RSC 1985, c C-46, s 490.1.

that can be used against the state to shield their property and assets. A discussion on the lack of constitutional protection of property rights and their history will now ensue to inform the reader on why litigants have generally relied on common law principles rather than the *Charter*.

### III. SECTION 7 OF THE *CHARTER* & THE LACK PROPERTY RIGHTS IN CANADA

Property rights in Canada are notably absent from the *Charter*. While the exact reasons are largely a matter of debate, their deliberate exclusion is not. Before the constitution was repatriated in 1982, there was mutual interest between the Liberal Party of Canada and the Conservative Party of Canada to enshrine property rights under the *Charter*.<sup>25</sup> In fact, early drafts of the constitution included property rights. However, these provisions did not survive subsequent debate due to continued opposition from provincial governments.<sup>26</sup>

Some of these provincial governments were concerned with constitutionally entrenching property rights. They feared doing so would undermine their power and control over property and civil rights under section 92(13) of *The Constitution Act, 1867*.<sup>27</sup> For example, the Attorney General of Saskatchewan pressured the Liberal government of Canada to back down from its efforts to include property rights due to concerns it had about limiting foreign ownership of land. This political maneuver, among others, resulted in the sacrifice of property rights from the *Charter* in order to garner the support of these dissenting provinces.<sup>28</sup> Although Prime Minister Pierre Trudeau could have unilaterally patriated the constitution, he wanted to avoid the appearance of imposing the constitution upon the provinces.<sup>29</sup> As such, property rights never made their way back into the final draft of the *Charter*. Since then, subsequent attempts to introduce property rights into section 7 have failed. First, the British Columbia legislature tried in 1983, followed by the House of Commons in 1988.<sup>30</sup>

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<sup>25</sup> Dwight G Newman and Lorelle Binnion, *The Exclusion of Property Rights from the Charter: Correcting the Historical Record*, 2015 52-3 Alberta Law Review 543, 2015 CanLIIDocs 113, < canlii.ca/t/6wc >, retrieved on 2023-04-17 at 554-555.

<sup>26</sup> *Ibid* at 552.

<sup>27</sup> *Ibid* at 555.

<sup>28</sup> *Ibid* at 556.

<sup>29</sup> *Ibid* at 553.

<sup>30</sup> *British Columbia, Legislative Assembly, Official Report of Debates (Hansard)*, 32<sup>nd</sup> Parl, 4<sup>th</sup> Sess (21 September 1982) at 9299; *House of Commons Debates*, 33<sup>rd</sup> Parl, 2<sup>nd</sup> Sess, No 12 (29 April 1988) at 14989.

In the context of civil forfeiture proceedings, this has forced defendants to mount creative defences based on common law principles and the *Charter*. For example in *Ontario (Attorney General) v. 8477 Darlington Crescent*, the defendant sought to rely on section 7 of the *Charter* in arguing his liberty interest was violated when the court ordered forfeiture of property pursuant to Ontario's forfeiture act, the *Civil Remedies Act*.<sup>31</sup> The defendant claimed ordering forfeiture based on the civil burden of proof of "on a balance of probabilities" was inconsistent with the principles of fundamental justice enshrined under section 7 of the *Charter*.<sup>32</sup>

The Ontario Court of Appeal rejected this argument, finding no property rights within section 7 of the *Charter*.<sup>33</sup> Even when section 7 is engaged, the Court found no supporting common law authority that requires a change in the standard of proof from "on a balance of probabilities" to the more onerous "beyond a reasonable doubt."<sup>34</sup> The Supreme Court of Canada ("SCC") also limited the application of section 7 to human beings in *Irwin Toy* because corporations and other artificial entities are incapable of enjoying the protections described under section 7, namely, life, liberty and security of the person.<sup>35</sup> As a result, if defendants of civil forfeiture proceedings are to rely on section 7, it would have to involve a breach of their rights as a person. For example in *Director of Civil Forfeiture v McDermid et al*, the defendants successfully argued their sections 7 and 8 *Charter* rights were breached as a result of the investigative steps taken by the Director of Civil Forfeiture in obtaining their financial records.<sup>36</sup> That decision will be subsequently discussed in further detail under the constitutional challenges to forfeiture legislation.

## A. The Canadian Bill of Rights

The *Canadian Bill of Rights* is one area that does offer some protection of property. Specifically, section 1(a) provides the following:

### Recognition and declaration of rights and freedoms

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

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<sup>31</sup> *Ontario (Attorney General) v 8477 Darlington Crescent*, 2011 ONCA 363 at para 53.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid* at para 54.

<sup>34</sup> *Ibid* at paras 54-55.

<sup>35</sup> *Irwin Toy Ltd V Quebec (Attorney General)*, [1989] 1 SCR 927 at 1003.

<sup>36</sup> *McDermid*, supra note 15.



- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;<sup>37</sup>

While the *Canadian Bill of Rights* does offer some protection over property, it is important to note its limitations. First, it only applies to federal legislation. Second, it cannot override or supersede other laws. Instead, its remedial authority involves rendering inoperative any federal legislation that conflicts with the *Canadian Bill of Rights*. The extent of this remedial power was clarified by the SCC in *The Queen v Drybones*, stating any impugned legislation can supersede the *Canadian Bill of Rights*, as long as Parliament expressly indicates so.<sup>38</sup> In *Drybones*, the court examined section 94(b) of the *Indian Act*, which created an offence for an Indian to be intoxicated off reserve, and section 2 of the *Canadian Bill of Rights*. The decision indicated the ease with which the *Canadian Bill of Rights* can be overridden so long as Parliament expresses an unambiguous intention for the impugned legislation to operate notwithstanding the *Canadian Bill of Rights*.<sup>39</sup> Finally, the *Canadian Bill of Rights* is not constitutionally entrenched like the *Charter*.

## B. Provincial Statutes

Some provinces like Alberta and Quebec have enacted their own statutes to safeguard property rights, such as the *Alberta Bill of Rights* and the *Quebec Charter*.<sup>40</sup> However, such legislation is neither universal across Canada nor constitutionally entrenched like the *Charter*. As a result, defendants have tried turning to common law principles in an attempt to undermine civil forfeiture proceedings.

## IV. LEGAL CHALLENGES

Litigants have attempted to thwart civil forfeiture proceedings in a number of ways by resorting to the *Charter*, as well as tangential legal concepts at common law that impact a defendant's *Charter* rights at trial.

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<sup>37</sup> *Canadian Bill of Rights*, SC 1960, c 44, s 1.

<sup>38</sup> See generally *The Queen v Drybones*, [1970] SCR 282.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Alberta Bill of Rights*, RSA 2000, c A- 14; *Charter of Human Rights and Freedoms*, CQLR, c C-12.

## A. Issue Estoppel

Issue estoppel is a common law doctrine that prevents a legal issue from being re-litigated. The rationale behind this concept was outlined by the SCC in *R v Mahalingan*.<sup>41</sup> In that decision, the Court held that out of fairness to the accused, they should not be called upon to answer questions already decided in their favour. By compelling the accused to do so, the Court stated this could lead to inconsistent findings that would undermine the integrity and coherence of the criminal law.<sup>42</sup> The Court also emphasized how “the institutional values of judicial finality and economy” are essential to maintaining the confidence of the justice system.<sup>43</sup> Once an issue has been litigated, it should be final and only subject to review upon appeal.<sup>44</sup>

In the forfeiture context, a defendant who faces simultaneous civil and criminal proceedings may seek to rely on issue estoppel to prevent the same legal issue from being heard twice. This is precisely what Mr. Vellone tried to do in the following case.

In *R v Vellone*, the accused sought to rely on this legal concept during a hearing in which the state was seeking forfeiture of his home as offence-related property.<sup>45</sup> Mr. Vellone was charged with a series of drug-related offences under the CDSA. The Crown claimed Mr. Vellone’s home facilitated drug sales by operating as a “stash house,” where narcotics and money were stored in between transactions.<sup>46</sup> At trial, Mr. Vellone was successful in bringing a motion to exclude evidence obtained in violation of his section 8 *Charter* rights.<sup>47</sup> The result of this was the exclusion of the impugned evidence pursuant to section 24(2) of the *Charter*. An acquittal was subsequently found on all but one of the charges, which he resolved by way of a guilty plea.<sup>48</sup>

Mr. Vellone then sought to prevent admission of the evidence during his forfeiture hearing by asserting issue estoppel. However, to succeed with issue estoppel in criminal law, the accused must demonstrate the following requirements outlined by the SCC in *Mahalingan*:

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<sup>41</sup> *R v Mahalingan*, 2008 SCC 63 at para 16 [*Mahalingan*].

<sup>42</sup> *Ibid* at para 45.

<sup>43</sup> *Ibid* at para 46.

<sup>44</sup> *Ibid*.

<sup>45</sup> See generally *R v Vellone*, 2020 QCCA 665, leave to appeal to SCC refused, 2021 CanLII 15594 [*Vellone*].

<sup>46</sup> *Ibid* at paras 7, 22.

<sup>47</sup> *Ibid* at para 7.

<sup>48</sup> *Ibid*.

- (1) the issue must have been resolved in the accused's favour in the previous criminal proceedings;
- (2) the issue decided must be final; and
- (3) the parties must be the same in both proceedings.<sup>49</sup>

During the forfeiture hearing, the trial judge re-engaged in a section 24(2) analysis to determine the admissibility of evidence despite her earlier ruling that favoured Mr. Vellone. The Quebec Court of Appeal upheld the trial judge's decision to conduct a section 24(2) analysis afresh, agreeing with her reasoning that the criminal trial and forfeiture proceedings serve distinct purposes.<sup>50</sup> The trial judge found Mr. Vellone's prosecution was concerned with determining guilt and the loss of liberty.<sup>51</sup> By contrast, the forfeiture hearing did not share the same punitive emphasis. Instead, the forfeiture proceeding was concerned with taking offence-related property out of circulation.<sup>52</sup> As a result, the trial judge found issue estoppel did not apply and proceeded to perform a section 24(2) analysis *de novo*.<sup>53</sup>

The onus then shifted to Mr. Vellone to demonstrate "that having regard to all of the circumstances, admission of the evidence would bring the administration into disrepute" pursuant to the three-part *Grant* analysis under section 24(2).<sup>54</sup> At trial, the judge found the first two factors of the *Grant* test favoured exclusion while the final factor favoured the admission of the evidence.<sup>55</sup> During the forfeiture hearing, she dispensed with an analysis of the first two factors because they still militated against inclusion.<sup>56</sup> On the final factor, however, she found the administration of justice would be brought into disrepute if the offence-related property were permitted to continue circulating.<sup>57</sup> As a result, she placed more weight on the final factor and admitted the evidence, despite the first two factors that favoured exclusion.

Although Mr. Vellone's matter arose out of provisions under the *CDSA* rather than a provincial forfeiture act, this case is nonetheless helpful as an appellate level authority in illuminating how the *Grant* test can be re-applied in a civil setting in determining the admissibility of improperly obtained evidence.

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<sup>49</sup> *Mahalingan*, *supra* note 41 at paras 52-56.

<sup>50</sup> *Vellone*, *supra* note 45 at paras 55-56.

<sup>51</sup> *Ibid* at para 55.

<sup>52</sup> *Ibid*.

<sup>53</sup> *Ibid* at para 49.

<sup>54</sup> *Grant*, *supra* note 18 at para 45.

<sup>55</sup> *Vellone*, *supra* note 45 at paras 57-60.

<sup>56</sup> *Ibid* at para 61.

<sup>57</sup> *Ibid* at para 62.

## B. Section 24(2)

A separate section of this article is dedicated to *Charter* challenges, however, Mr. Vellone's case is being discussed here due to the nature of his challenge. Instead of arguing that a specific *Charter* right was breached, Mr. Vellone challenged the admissibility of the evidence by relying on the finality of the section 24(2) finding at trial. He claimed that the exclusion of evidence ruling under section 24(2) at trial prevented the Crown from relying upon the same evidence during the forfeiture proceedings.<sup>58</sup> While the Court acknowledged that orders made under section 24(2) within the same proceeding are generally final, they also held exceptions do exist.

The Court referred to *R v Calder*, where the SCC held reconsideration of section 24(2) may be justified when a material change in the circumstances has occurred.<sup>59</sup> However, the Quebec Court of Appeal held that the exceptions outlined in *Calder* only apply to applications for review of orders made within the same proceeding.<sup>60</sup> Unfortunately for Mr. Vellone, the Court of Appeal determined his criminal trial was separate from his forfeiture hearing, as the latter took place under a provision of the CDSA.<sup>61</sup> The Court accordingly ruled against him on this argument.

## C. Stay of Proceedings

*The Director of Criminal Property and Forfeiture v Gurniak et al* is another forfeiture case that demonstrates the ingenuity of defendants to raise legal arguments premised on common law doctrines and the *Charter*.<sup>62</sup> In *Gurniak 1*, the defendant was facing parallel proceedings in criminal and civil court. He brought a motion for a stay of proceedings against the civil matter on the basis that his right to silence would be jeopardized during his criminal trial. In particular, he feared the parallel proceedings would affect his *Charter*-protected rights under sections 7 and 11.<sup>63</sup>

The motion's judge granted the stay of proceedings, finding that while rare and exceptional circumstances are normally required to grant a stay of proceedings, the threshold should be lowered where parallel proceedings are underway.<sup>64</sup> The motion's judge based her decision on several grounds.

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<sup>58</sup> *Ibid* at paras 23, 25.

<sup>59</sup> See generally *R v Calder*, [1996] 1 SCR 660.

<sup>60</sup> *Vellone*, *supra* note 45 at para 32.

<sup>61</sup> *Ibid*.

<sup>62</sup> See generally *The Director of Criminal Property and Forfeiture v Gurniak et al*, 2020 MBCA 96 [*Gurniak 2*].

<sup>63</sup> *The Director of Criminal Property and Forfeiture v Gurniak et al*, 2019 MBQB 80 at para 33 [*Gurniak 1*].

<sup>64</sup> *Ibid* at para 32.

First, she found that the Director of Civil Forfeiture is distinct from other litigants in that it would not suffer prejudice from a delay in obtaining a remedy.<sup>65</sup> Second, she believed the relationship between the Director and the police would result in a coordinated effort to undermine the fairness of the accused's criminal prosecution.<sup>66</sup> Her concern was that the police would share information with the Crown that it gained through the civil proceeding.<sup>67</sup> Finally, she concluded the *Charter* and *Manitoba Evidence Act* were inadequate in protecting the defendant from the risk of derivative evidence.<sup>68</sup>

The Manitoba Court of Appeal disagreed with the motion judge's ruling, finding she erred in applying the proper legal test.<sup>69</sup> Ordinarily, the test from *RJR-MacDonald* is used to determine whether a stay of proceedings should be granted.<sup>70</sup> However, the three-part test from that case is not used when criminal and civil proceedings are being heard concurrently.<sup>71</sup> Instead, the Court examines "whether there are exceptional or extraordinary circumstances which show that the right of the applicant on the criminal charge cannot adequately be addressed by the rules governing the civil proceeding or a remedy available to an accused in their criminal process."<sup>72</sup> The Court also found no presumption in favour of a stay of proceedings simply due to the existence of parallel proceedings.<sup>73</sup> In fact, the presumption is the opposite: that the proceedings can be dealt with fairly and that the applicant bears the burden of demonstrating otherwise.<sup>74</sup>

Mr. Gurniak then tried arguing derivative evidence could be obtained from the civil proceedings that would incriminate him during prosecution.<sup>75</sup> He claimed affidavits or compelled testimony would end up in the hands of the Crown.<sup>76</sup> Additionally, he was worried that such evidence may reveal defence strategy or further crimes that have not come to the attention of law enforcement yet.<sup>77</sup> Ultimately, he argued this would

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<sup>65</sup> *Ibid* at paras 27, 28,40.

<sup>66</sup> *Ibid* at para 28.

<sup>67</sup> *Ibid*.

<sup>68</sup> *Ibid* at paras 34-36.

<sup>69</sup> *Gurniak 2, supra* note 62 at paras 39-42.

<sup>70</sup> *Ibid* at para 38.

<sup>71</sup> *Ibid* at para 39.

<sup>72</sup> *Ibid* at para 40.

<sup>73</sup> *Ibid*.

<sup>74</sup> *Ibid*.

<sup>75</sup> *Ibid* at para 47.

<sup>76</sup> *Ibid*.

<sup>77</sup> *Ibid* at para 48.

undermine trial fairness, and a stay of proceedings should be entered as a result.<sup>78</sup>

The Court of Appeal acknowledged Mr. Gurniak's concerns in *Gurniak 2* but held sufficient protections exist to prevent the defendant's criminal trial from being prejudiced by the concurrent proceedings. First, the Court held there is a distinction between use immunity and derivative use immunity.<sup>79</sup> Use immunity prevents the direct admission of evidence obtained through compelled testimony.<sup>80</sup> For example, the Court referenced, and the defendant conceded, that the *Charter* and the *Canada Evidence Act* prevent self-incrimination. Specifically, section 13 of the *Charter* provides:

A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.<sup>81</sup>

Additional safeguards were identified by the Court in the *Canada Evidence Act* and *The Manitoba Evidence Act* that prevent self-incrimination in subsequent proceedings. These provisions serve to restrict the use of answers provided during litigation to the proceedings at hand.<sup>82</sup> They are reproduced here for ease of reference:

## Canada Evidence Act

### Incriminating questions

5(1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.<sup>83</sup>

### Answer not admissible against witness

5(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution

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<sup>78</sup> *Ibid* at para 49.

<sup>79</sup> *Ibid* at para 50.

<sup>80</sup> *Ibid*.

<sup>81</sup> *The Charter*, *supra* note 17, s 13.

<sup>82</sup> *Gurniak 2*, *supra* note 62 at para 51.

<sup>83</sup> *Canada Evidence Act*, RSC 1985, c C-5, s 5(1).

for perjury in the giving of that evidence or for the giving of contradictory evidence.<sup>84</sup> [Emphasis added]

## The Manitoba Evidence Act

### Incriminating questions

6(1) No witness shall be excused from answering any question, or producing any document, upon the ground that the answer thereto or the production thereof may tend to criminate him, or may tend to establish his liability to a legal proceeding at the instance of the Crown or of any person.<sup>85</sup>

### Evidence not to be used

6(2) If, with respect to any question or the production of any document, a witness objects to answer or to produce upon any of the grounds mentioned in subsection (1), and if but for this section or any Act of the Parliament of Canada, the witness would have been excused from answering that question or from producing that document, then although the witness is, by reason of this section or any Act of the Parliament of Canada, compelled to answer or to produce, the answer so given or the document so produced shall not be used or receivable in evidence in any legal proceeding against him thereafter taking place.<sup>86</sup> [Emphasis added]

Similar to use immunity, derivative use immunity exists to prevent the evidence or testimony of witnesses from being used against them indirectly.<sup>87</sup> In *Thompson Newspapers Ltd. v Canada (Director of Investigation and Research)*, Justice L’Heureux-Dubé defined derivative evidence as “all facts, events or objects whose existence is discovered as a result of a statement made to the authorities.”<sup>88</sup> Moreover, in the same decision, Justice Wilson held, “[t]here is a direct causal relationship between the compelled testimony and the derivative evidence. ... [C]ausality is the *sine qua non* of derivative evidence.”<sup>89</sup> The concern with derivative use immunity is the gathering of evidence from statements and testimony given by litigants in their effort to defend the civil suit against them.<sup>90</sup> In *Thompson Newspapers Ltd.*, the Court refers to the text of Justice Sopinka with regard to onus and proof, where the text states:

The Supreme Court of Canada, in the cases of *R. v. S. (R.J.) and British Columbia (Securities Commission) v. Branch*, [1995] 2 SCR 3, considered the question of the use to which evidence discovered as a result of a witness’ testimony can be put. If

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<sup>84</sup> *Ibid*, s 5(2).

<sup>85</sup> *The Manitoba Evidence Act*, CCSM c E150, s 6(1).

<sup>86</sup> *Ibid*, s 6(2).

<sup>87</sup> *Gurniak 2*, *supra* note 62 at para 52.

<sup>88</sup> *Thompson Newspapers Ltd V Canada (Director of Investigation and Research)*, [1990] 1 SCR 425 at 574 [*Thompson Newspapers*].

<sup>89</sup> *Ibid* at 484.

<sup>90</sup> *Gurniak 2*, *supra* note 62 at para 52.

the evidence would not have been discovered but for the compelled testimony of the witness, such derivative evidence will be excluded from the trial.<sup>91</sup>

The Manitoba Court of Appeal also held section 7 of the *Charter* has been interpreted to prevent the use of any incriminating evidence in subsequent trials, referring once again to the text of Justice Sopinka.<sup>92</sup>

In light of the existing statutory and common law protections, the Manitoba Court of Appeal dismissed Mr. Gurniak's appeal.<sup>93</sup> The Court also stated derivative use immunity only applies where such evidence actually exists.<sup>94</sup> This extends to include potential disclosure through civil proceedings, such as a forfeiture hearing.<sup>95</sup> In Mr. Gurniak's case, speculation and hypothetical concerns of compelled testimony from the civil action spilling over to the criminal trial do not meet the threshold for a stay of proceedings.<sup>96</sup>

Finally, before the Court allowed the Director's appeal, it held that other protections, such as the implied undertaking rule exist. In *Juman v Doucette*, the SCC elaborated on the implied undertaking rule. The issue in *Juman* was whether *bona fide* disclosures of transcripts of civil proceedings could be disclosed to the police.<sup>97</sup> In that case, the Vancouver Police Department ("VPD") and the Attorney General of British Columbia ("AGBC") sought to obtain the trial transcripts of a daycare worker who faced a claim of negligence.<sup>98</sup> The SCC ultimately held that *bona fide* disclosures of the kind that the VPD and AGBC were requesting violated the implied undertaking rule.<sup>99</sup>

The implied undertaking rule prevents pre-trial discovery from being used for purposes extraneous to the civil process in which the statements or evidence arise.<sup>100</sup> The consequences of breaching the undertaking can result in serious remedies, such as a stay or dismissal of the proceeding, striking a defence, or even contempt.<sup>101</sup> There are only exceptional circumstances where the implied undertaking rule can be overridden.<sup>102</sup>

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<sup>91</sup> *Thompson Newspapers*, *supra* note 88 at 573-574.

<sup>92</sup> *Gurniak 2*, *supra* note 62 at para 56.

<sup>93</sup> *Ibid* at para 69.

<sup>94</sup> *Ibid* at para 59.

<sup>95</sup> *Ibid* at para 58.

<sup>96</sup> *Ibid* at para 73.

<sup>97</sup> *Juman v Doucette*, 2008 SCC 8 at para 1.

<sup>98</sup> *Ibid*.

<sup>99</sup> *Ibid* at para 58.

<sup>100</sup> *Ibid* at para 4.

<sup>101</sup> *Ibid* at para 29.

<sup>102</sup> *Ibid* at para 30.



For example, when the applicant seeking to use the information outside of the civil proceedings demonstrates on a balance of probabilities that a public interest exists that is of greater weight than the values the implied undertaking rule seeks to protect.<sup>103</sup> Such values include ensuring the parties are forthcoming and complete with their responses during discovery.<sup>104</sup> Protecting the privacy of the parties to the litigation from exposure to embarrassing, defamatory, or salacious gossip likewise qualify.<sup>105</sup>

Alternatively, one possible situation where disclosure could be made with little prejudice to the examined party is when the same parties are involved.<sup>106</sup> In these circumstances, the SCC reasoned that prejudice to the examinee in such circumstances would be non-existent. Another possible exception involves impeaching the witness for prior inconsistent statements, as does public safety.<sup>107</sup> Finally, the police may seek a warrant to obtain the material; however, doing so would require the police to satisfy the necessary judicial requirements.<sup>108</sup>

To summarize, Mr. Gurniak's case represents another creative attempt to undermine civil forfeiture proceedings through the use of common law doctrines. Although it provides contextual information surrounding previous attempts by litigants to thwart civil forfeiture proceedings, it does not address the larger issue of how a court should procedurally or substantively navigate a *Charter* breach.

#### **D. *Charter* Challenges to Legislation**

The *Charter* has been used by many defendants in their defence against civil forfeiture claims, alleging their sections 7, 8, 9 and 10(b) *Charter* rights were violated. For example, in *Director of Civil Forfeiture v McDermid et al*, the defendants ("the McDermids") challenged sections 22.02 and 11.01 of the *BC Civil Forfeiture Act*, also known as the asset tracing provisions.<sup>109</sup> The litigation arose out of an order sought by the Director of Civil Forfeiture ("the Director") for the McDermids' banking records.<sup>110</sup>

In this case, the Director sought the McDermid's financial records after the Vancouver Police Department made a referral to the Director alleging cannabis oil extraction laboratories were being operated on properties

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<sup>103</sup> *Ibid* at para 32.

<sup>104</sup> *Ibid* at para 26.

<sup>105</sup> *Ibid* at para 24.

<sup>106</sup> *Ibid* at para 35.

<sup>107</sup> *Ibid* at paras 40-41.

<sup>108</sup> *Ibid* at para 6.

<sup>109</sup> *McDermid*, supra note 15 at paras 2, 18.

<sup>110</sup> *Ibid* at para 8.

owned by the McDermids.<sup>111</sup> As a result, the Director commenced civil proceedings against the McDermids shortly thereafter, alleging the properties in question were proceeds and instruments of unlawful activity.<sup>112</sup>

Sections 22.02 and 11.01 permit the Director to obtain third-party information by court order, such as financial records.<sup>113</sup> The McDermids challenged the constitutional validity of these provisions, alleging they deprive individuals of the right to life, liberty, and security of the person as well as constitute unreasonable search and seizure, as protected under sections 7 and 8 of the Charter, respectively.<sup>114</sup> With respect to section 7, the McDermids claimed the “quasi-criminal’ nature of CFA proceedings, the overbroad nature of the provisions, and the lack of procedural safeguards deprive them of the right to life, liberty and security of the person and are contrary to the principles of fundamental justice as guaranteed by s. 7.”<sup>115</sup>

As for the section 8 challenge, the McDermids claimed they had a reasonable expectation of privacy in the information that their financial institutions were ordered to produce pursuant to orders made under sections 22.02 and 11.01.<sup>116</sup> They also claimed the financial records went to the biographical core of an individual, and as such amounted to a search and seizure within the meaning section 8 of the *Charter*.<sup>117</sup>

In dealing with the alleged breaches, the Court concluded that all of the constitutional challenges will be dealt with under section 8 of the *Charter*, including those under section 7.<sup>118</sup>

With respect to section 22.02, the Court found that the information disclosed under this section only relates to what was described as “tombstone” information. Such information is limited to the individual’s name, date of birth and whether that individual maintains an active account with the financial institution in question.<sup>119</sup> As a result, the Court found such basic information does not go to the biographical core of an individual.<sup>120</sup> In reaching its decision, the Court stated privacy expectations

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<sup>111</sup> *Ibid* at para 7.

<sup>112</sup> *Ibid* at para 10.

<sup>113</sup> *Ibid* at para 20.

<sup>114</sup> *Ibid* at para 4 and 35.

<sup>115</sup> *Ibid* at para 35.

<sup>116</sup> *Ibid* at para 36.

<sup>117</sup> *Ibid*.

<sup>118</sup> *Ibid* at para 57.

<sup>119</sup> *Ibid* at para 127.

<sup>120</sup> *Ibid*.

are reduced under civil law matters as opposed to criminal proceedings.<sup>121</sup> Upon finding no reasonable expectation of privacy, the Court concluded section 8 is therefore not engaged.<sup>122</sup>

As for section 11.01, the *Charter* challenge involved the reasonableness of the law authorizing the search and seizure.<sup>123</sup> In determining the reasonableness of the law, the Court adopted the flexible approach outlined by the Supreme Court of Canada in *Goodwin v British Columbia (Superintendent of Motor Vehicles)* and examined the following factors:

- (a) the nature of the legislative scheme; (b) the purpose of the legislative scheme; (c) the mechanisms employed, having regard for the degree of its potential intrusiveness, and
- (d) The availability of judicial supervision or other procedural safeguards.<sup>124</sup>

### ***1. The nature of the legislative scheme***

The Court held that the nature of the proceedings should be seen on a sliding scale, given that they are commenced under civil law, but also include some stigma relating to criminal conduct.<sup>125</sup> In particular, the Court held that the standard of reasonableness is skewed towards quasi-criminal due to its inherent connection to criminal conduct and “the spectre of criminality” from the allegations.<sup>126</sup> As such, the Court found this factor weighs against the reasonableness of the authorizing statute.<sup>127</sup>

### ***2. The purpose of the legislative scheme***

The Court agreed with the Attorney General of BC’s argument that sections 22.02 and 11.01 assist in achieving the following identified goals of the legislation:

- (1) to take the profit out of unlawful activity;
- (2) to prevent the use of property to unlawfully acquire wealth or cause bodily injury;  
and
- (3) to compensate victims of crime and fund crime prevention and remediation.<sup>128</sup>

Having been satisfied that sections 22.02 and 11.01 assist in accomplishing the listed goals by allowing the Director to identify the

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<sup>121</sup> *Ibid* at para 129.

<sup>122</sup> *Ibid* at para 130.

<sup>123</sup> *Ibid* at para 134.

<sup>124</sup> *Ibid* at para 137.

<sup>125</sup> *Ibid* at paras 153, 162.

<sup>126</sup> *Ibid* at paras 159, 162.

<sup>127</sup> *Ibid* at para 163.

<sup>128</sup> *Ibid* at paras 139, 142-143.

parties and assets involved, it found this factor weighed in favour of reasonableness.<sup>129</sup>

### ***3. The mechanisms employed, having regard for the degree of its potential intrusiveness***

Under this branch of the analysis, the Court held that the search does not involve any surveillance, physical intrusions that could violate the bodily integrity of the McDermids, or concerns of entry into a private residence.<sup>130</sup> Instead, the mechanism is through the judicial system by obtaining prior judicial authorization in the form of a warrant.<sup>131</sup> However, the Court found the nature of the information that can be compelled under section 11.01 goes to the biographical core of personal information, a point which the Director and Attorney General conceded.<sup>132</sup>

The Court ultimately found the broad range of information available to the Director under this section to constitute a significant interference with an individual's privacy rights. Accordingly, this factor militated against its reasonableness.<sup>133</sup> Specifically, the type of records that be compelled include "written or oral responses from colleagues or friends about a variety of matters including an individual's day-to-day activities, their associates, and habits."<sup>134</sup> The Court's concern was also rooted in the section's broad language which empowers the Director to obtain information even in the absence of a forfeiture claim.<sup>135</sup> While the Court acknowledged that not every case will necessarily involve compelling the broad scope of information that the provision authorizes, the potential for its abuse remained a concern.<sup>136</sup>

### ***4. The availability of judicial supervision or other procedural safeguards***

The Court acknowledged the inherent safeguard in requiring prior judicial authorization and was satisfied that the "reasonably required" mandate provides courts with some discernable parameters to ensure an individual's privacy is respected.<sup>137</sup> However, the Court was troubled by the lack of required notice to the affected parties under this section when

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<sup>129</sup> *Ibid* at paras 143, 145.

<sup>130</sup> *Ibid* at para 166.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid* at para 169.

<sup>133</sup> *Ibid* at paras 175, 186.

<sup>134</sup> *Ibid* at para 173.

<sup>135</sup> *Ibid* at paras 180, 186.

<sup>136</sup> *Ibid* at para 186.

<sup>137</sup> *Ibid* at paras 189, 195.

their information is accessed.<sup>138</sup> As such, the Court found the absence of statutory notice obligations sufficient to justify its concerns about the constitutional validity of this provision.<sup>139</sup> In particular, the Court expressed concern with the possibility that an individual may never discover that their personal information was accessed unless formal proceedings ensue.<sup>140</sup> Accordingly, the Court found this jeopardizes the constitutional validity of the section.<sup>141</sup>

### **E. Overall Assessment of the *Goodwin* Factors**

Having regard to all of the factors considered, the Court found the legislative purpose and prior judicial authorization requirement to weigh in favour of finding the provision reasonable.<sup>142</sup> By contrast, the intrusive nature of the search, its limitless capacity to compel information, as well as the broad definition of the powers, functions and duties that the information must be tied to, all weighed against finding the provision reasonable.<sup>143</sup>

Further, the broad and overbreadth nature of the provision allows the Director to obtain information that “tends to reveal intimate details of the lifestyle and personal choices of the individual” that the individual has an expectation of privacy in.<sup>144</sup> The broad scope of this language militated against the judicial oversight involved in obtaining a production order due to the ease with which the Director could link the request to their powers, functions and duties.<sup>145</sup> As the Court described it, the Director may receive information about individuals that is not required, or possibly even relevant to the specific matter at hand.<sup>146</sup> This potential abuse was compounded by the lack of mandatory notice required until formal proceedings are launched. The Court accordingly concluded that section 11.011 does not achieve a reasonable balance between the state’s goals and ensuring individual privacy rights in accordance with section 8 of the *Charter*.<sup>147</sup>

In short, the Court held that section 22.02 withstands constitutional scrutiny, while section 11.01 was held to constitute an unreasonable search

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<sup>138</sup> *Ibid* at para 204.

<sup>139</sup> *Ibid* at para 206.

<sup>140</sup> *Ibid* at paras 204, 207.

<sup>141</sup> *Ibid* at para 207.

<sup>142</sup> *Ibid* at para 211.

<sup>143</sup> *Ibid* at para 212.

<sup>144</sup> *Ibid* at para 213.

<sup>145</sup> *Ibid* at para 214.

<sup>146</sup> *Ibid*.

<sup>147</sup> *Ibid* at paras 215, 217.

and seizure, contrary to section 8 of the *Charter*.<sup>148</sup> As of the time of writing, the Court has not ruled on whether the provisions can be upheld under section 1 of the *Charter* as a reasonable limit.<sup>149</sup>

## F. *Charter* Challenges to State Misconduct

Beyond constitutional challenges to legislation, defendants have also raised *Charter* issues over the collection of improperly obtained evidence. For instance, in *Alberta (Minister of Justice and Attorney General) v Squire*, a civil forfeiture case commenced under Alberta forfeiture legislation, the defendant asserted a series of *Charter* breaches.<sup>150</sup> The case involved a claim against the \$27,020 cash that was located in the vehicle driven by Mr. Squire.

Mr. Squire came to the attention of the police while driving past two officers on the highway.<sup>151</sup> During this brief encounter, the police noticed Mr. Squire's vehicle was missing a mud flap and queried his license plate in their database. The results indicated the vehicle was recently queried by the Vancouver Police Department and the Dryden Police.<sup>152</sup> A vehicle stop was then initiated by the officers.

During the traffic stop, the officers engaged Mr. Squire in a conversation, in which they observed a suitcase stowed behind the centre console and two cell phones on the front passenger seat.<sup>153</sup> The police then retreated back to their vehicle to decide how to handle the situation.<sup>154</sup> Based on their experience, they eventually decided to request the assistance of a canine unit.<sup>155</sup>

When the dog handler arrived, Mr. Squire was asked to exit the vehicle and accompany the officers to the rear of their cruiser. The officers then cautioned Mr. Squire and provided him with his right to counsel.<sup>156</sup> An interrogation then began, in which Mr. Squire disclosed where he was traveling to, whether there were any illegal substances in the vehicle and the \$27,020 currency that was in the vehicle.<sup>157</sup> While the interrogation occurred, the dog handler conducted a "sniffer dog" search of the vehicle

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<sup>148</sup> *Ibid* at para 6.

<sup>149</sup> *Ibid* at para 231.

<sup>150</sup> *Alberta (Minister of Justice and Attorney General) v Squire*, 2012 ABQB 194 at para 2 [Squire].

<sup>151</sup> *Ibid* at para 6.

<sup>152</sup> *Ibid* at paras 6, 7.

<sup>153</sup> *Ibid* at para 10.

<sup>154</sup> *Ibid* at para 12.

<sup>155</sup> *Ibid* at para 13.

<sup>156</sup> *Ibid* at para 14.

<sup>157</sup> *Ibid* at para 15.

with the canine and the dog made a positive indication of a controlled substance odour.<sup>158</sup>

Following this indication, the officers reassessed their observations in light of the large sum of cash Mr. Squire disclosed to possessing.<sup>159</sup> The officers then placed Mr. Squire under arrest and read him the reasons for his arrest. At this point, Mr. Squire indicated he wished to speak with counsel, however his request was never fulfilled.<sup>160</sup> Instead, Mr. Squire was confronted with two options. The first option was to sign a statement of relinquishment indicating he was not the rightful owner of the money and forfeit it.<sup>161</sup> On the other hand, the second option was to claim ownership of the funds and be charged with possession of proceeds of crime.<sup>162</sup>

Mr. Squire ultimately chose the former option out of fear that the latter option would result in the seizure of the vehicle, which belonged to his brother.<sup>163</sup> This ended his interaction with the police.<sup>164</sup>

When the matter went to trial, Mr. Squire alleged a breach of his sections 8, 9 and 10(b) *Charter* rights, citing an illegal detention due to the lack of reasonable suspicion and denial of right to counsel.<sup>165</sup> He argued that the subsequent interrogation and search of his vehicle constituted a further infringement of his section 8 rights. Finally, Mr. Squire claimed his section 10(b) right was breached when the police failed to facilitate access to counsel.<sup>166</sup> The Court agreed with Mr. Squire, finding his section 8 *Charter* rights were breached as a result of the lack of reasonable suspicion required to detain him.<sup>167</sup> The judge also found the evidence from the interrogation and search to constitute fruits of an illegal search and seizure.<sup>168</sup>

With respect to section 10(b) of the *Charter*, the judge rejected the Minister's argument that Mr. Squire's right to counsel could not be facilitated due to the lack of privacy on the side of the road.<sup>169</sup> Similarly, the judge also dismissed the Attorney General's argument that Mr. Squire waived his right to counsel by signing the statement of relinquishment.<sup>170</sup>

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<sup>158</sup> *Ibid* at para 16.

<sup>159</sup> *Ibid* at para 17.

<sup>160</sup> *Ibid*.

<sup>161</sup> *Ibid* at para 19.

<sup>162</sup> *Ibid* at para 20.

<sup>163</sup> *Ibid* at paras 20-21.

<sup>164</sup> *Ibid* at para 22.

<sup>165</sup> *Ibid*.

<sup>166</sup> *Ibid*.

<sup>167</sup> *Ibid* at para 40.

<sup>168</sup> *Ibid* at para 49.

<sup>169</sup> *Ibid* at para 55.

<sup>170</sup> *Ibid* at paras 56, 57.

Such an argument was found to be illogical, as the purpose of section 10(b) is to assist the individual in need of legal advice in a time of jeopardy by clarifying the implications of his decision.<sup>171</sup> Accordingly, the Court held it would render section 10(b) meaningless if the police were permitted to rely on Mr. Squire's uninformed choice in signing the statement as the basis to absolve the police of their obligations under section 10(b).<sup>172</sup> As such, the Court found Mr. Squire's 10(b) right to be violated.<sup>173</sup>

Upon finding that Mr. Squire's *Charter* rights were breached, the Court turned to section 24(2) to determine admissibility of the evidence. The Minister argued the *Grant* factors under section 24(2) should not be afforded the same weight in a forfeiture hearing, due to the absence of any risk to his liberty.<sup>174</sup> In support of this argument, the Minister relied on *R v Daley*, a pre-*Grant* case from the Alberta Court of Appeal, where the Court dealt with a forfeiture claim made under a provision of the *Criminal Code*. The Court held *Daley* was distinguishable on the basis it was decided under the *Collins/Stillman* approach to section 24(2), which was overhauled by the SCC in *Grant*.<sup>175</sup>

Under the *Grant* approach to section 24(2), the Court found the state infringing conduct is not mitigated by a change in the nature of the proceedings.<sup>176</sup> Regardless of whether the proceedings are commenced under criminal or civil law, the Court found the egregious behaviour of the state remains constant.<sup>177</sup> As a result, the Court proceeded to apply the *Grant* test.

Under the first factor, the seriousness of the breach, the Court did not find the police conduct to be particularly heinous, but it did state that reasonable suspicion and investigative detention are well established concepts that the police ought to get right.<sup>178</sup> With respect to the second factor, the impact of the breach on the *Charter* protected right, the Court found the breach undermined Mr. Squire's liberty to be free from state interference, privacy interests and right to silence.<sup>179</sup> Under the final branch of analysis, society's interest in adjudicating the matter on its merits, the Court found the physical evidence seized favoured admission because of its

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<sup>171</sup> *Ibid* at para 57.

<sup>172</sup> *Ibid*.

<sup>173</sup> *Ibid* at para 58.

<sup>174</sup> *Ibid* at para 59.

<sup>175</sup> *Ibid* at para 60.

<sup>176</sup> *Ibid* at para 63.

<sup>177</sup> *Ibid* at paras 63, 64.

<sup>178</sup> *Ibid* at para 66.

<sup>179</sup> *Ibid* at para 67.



reliability.<sup>180</sup> By contrast, the signed statement of relinquishment was held to be highly unreliable, with the judge questioning whether Mr. Squire was coerced into providing his signature.<sup>181</sup> This favoured exclusion of the evidence. As such, all of the impugned evidence was excluded pursuant to section 24(2).<sup>182</sup>

Since *Squire*, further challenges have been raised under the *Charter*. For example, in *Director (Under the Seizure of Criminal Property Act, 2009) v Negash*, the Court found the defendant's section 10(b) *Charter* right was infringed, but admitted the evidence after conducting a brief analysis under section 24(2) of the *Charter*.<sup>183</sup> Similarly, in *AG Ontario and \$164,300 in Currency and AGO v \$68,870 Cdn Currency & \$3,700 US currency (In Rem)*, the defendants both claimed their section 8 *Charter* rights were violated, but the Court in both decisions disagreed, finding no *Charter* infringement.<sup>184</sup>

## V. *CHARTER* BREACHES AND REMEDIES

As seen in *Squire* and *Negash*, section 24(2) of the *Charter* has been applied to resolve issues of admissibility regarding evidence obtained in violation of a *Charter* protected right. However, it is also worth noting that provincial forfeiture statutes offer another form of relief to defendants. Section 6 of British Columbia's *Civil Forfeiture Act*, which provides a possible avenue of resolution by authorizing a court to grant the following relief to the defendant.

### Relief from forfeiture

6 (1) If a court determines that the forfeiture of property or the whole or a portion of an interest in property under this Act is clearly not in the interests of justice, the court may do any of the following:

- (a) refuse to issue a forfeiture order;
- (b) limit the application of the forfeiture order;
- (c) put conditions on the forfeiture order.<sup>185</sup>

Section 6 of BC's *Civil Forfeiture Act* is just one example of several other relief provisions that exist in civil forfeiture legislation across the country.

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<sup>180</sup> *Ibid* at para 69.

<sup>181</sup> *Ibid*.

<sup>182</sup> *Ibid* at para 70.

<sup>183</sup> See generally *Director (Under the Seizure of Criminal Property Act, 2009) v Negash*, 2021 SKQB 240 [*Negash*].

<sup>184</sup> See generally *AG Ontario and \$164,300 in Currency*, 2019 ONSC 2024 and *AGO v \$68,870 Cdn Currency & \$3,700 US currency (In Rem)*, 2019 ONSC 6546

<sup>185</sup> *Civil Forfeiture Act*, *supra* note 3, s 6.

However, the issue with section 6 and other relief provisions under provincial statutes is that they merely authorize the court to refuse ordering forfeiture of the impugned property. The remedial provision does not address the underlying *Charter* breach by excluding impugned evidence. As such, section 24(2) of the *Charter* is the appropriate remedial provision to resolve issues of improperly obtained evidence in civil proceedings, as it is in criminal law matters. This was the approach taken by Justice Sullivan in *Alberta (Justice and Attorney General) v Petros*, a civil forfeiture case in which the defendant alleged sections 8 and 9 *Charter* violations.<sup>186</sup>

In that decision, Justice Sullivan held the Alberta Minister of Justice cannot rely on improperly obtained evidence in a civil forfeiture matter. He reasoned that the *Charter* is an instrument that holds the state accountable for his misconduct, citing the Justice LaForest's decision in *McKinney v University of Guelph*.<sup>187</sup> In the context of civil forfeiture, Justice Sullivan held the *Charter* applies as a means of ensuring fairness in the proceedings.<sup>188</sup>

Since *Petros*, Alberta forfeiture cases and a small number of others from neighbouring jurisdictions have continued to follow Justice Sullivan's ruling by applying section 24(2) and the *Grant* test to subsequent forfeiture proceedings.<sup>189</sup> Although these cases continue to apply the *Charter* in civil settings, there is an insufficient number of cases to reveal a clear and consistent approach to section 24(2). To date, no appellate court has addressed the issue of improperly obtained evidence strictly in the context of civil proceedings and examined whether the test should continue apply as set out by the SCC.

## A. Issues in Applying *Grant* to Forfeiture Proceedings

In *Grant*, the SCC introduced a new approach to the exclusion of evidence analysis under section 24(2) of the *Charter*.<sup>190</sup> The new test required courts to balance the following three avenues of inquiry in determining whether “admission of the evidence would bring the administration of justice into disrepute.”

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<sup>186</sup> See generally *Alberta (Justice and Attorney General) v Petros*, 2011 ABQB 541 at paras 36-37 [*Petros*].

<sup>187</sup> *Ibid* at para 37.

<sup>188</sup> *Ibid*.

<sup>189</sup> *Alberta (Justice) v Wong*, 2012 ABQB 498 (See also *Mackie v Alberta (Minister of Justice and Attorney General)*, 2014 ABQB 173; *Feuerhelm v Alberta (Justice and Attorney General)*, 2017 ABQB 709; *Director (Under the Seizure of Criminal Property Act, 2009) v Negash*, 2021 SKQB 240).

<sup>190</sup> *Grant*, *supra* note 18.

- (1) the seriousness of the state's offending conduct;
- (2) the impact of the breach on the accused's *Charter*-protected interests; and
- (3) society's interest in the adjudication of the case on the merits.<sup>191</sup>

The difficulty with applying the *Grant* framework to civil forfeiture proceedings is that the test arose out of a criminal matter, in which the SCC specifically referred to the truth-seeking function of the criminal trial process in that decision.<sup>192</sup> Specifically, under the third inquiry, the question posed is whether the truth-seeking function of the criminal process would be better served by the admission or exclusion of the impugned evidence.<sup>193</sup> However, forfeiture proceedings are not concerned with determining guilt. Rather, the purpose and nature of the proceedings differ significantly, calling into question the appropriateness of a straight forward application of the *Grant* test, as seen in *Squire and Negash*.

There are a number of distinctions that those courts did not consider in assessing the weight to be afforded to each branch of the analysis. First, the subject of forfeiture hearings is real property, not an accused. This is a salient distinction that was highlighted by the Court in *Vellone*, in which it found makes the hearing akin to a civil process.<sup>194</sup>

Second, civil proceedings serve a different purpose than criminal trials. The purpose of forfeiture hearings was identified by the Court in *Vellone* as reducing the continued circulation of offence-related property, another distinction that the Court of Appeal agreed with when it upheld the trial judge's decision to conduct her 24(2) analysis *de novo*.<sup>195</sup> By contrast, prosecutions are concerned with the truth-seeking function of the criminal process stated in *Grant*.<sup>196</sup>

While it is true civil forfeiture proceedings are undeniably connected to unlawful activity, they are not concerned with punishing the defendant. In fact, the BC *Civil Forfeiture Act* authorizes the Director to proceed in the absence of a prosecution. Section 18(a) of the Act permits the finding of unlawful activity even if no person is charged with an offence that falls under the provided definition.<sup>197</sup> Further, section 18(b) allows a finding of unlawful activity even where a person is acquitted of all charges.<sup>198</sup> This lends further support to the idea that the forfeiture hearing is solely

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<sup>191</sup> *Ibid* 8 at para 50.

<sup>192</sup> *Ibid* at para 79.

<sup>193</sup> *Ibid*.

<sup>194</sup> *Vellone*, *supra* note 45 para 41.

<sup>195</sup> *Ibid* at paras 54-55.

<sup>196</sup> *Grant*, *supra* note 18 at para 59.

<sup>197</sup> *Civil Forfeiture Act*, *supra* note 3, s 18(a).

<sup>198</sup> *Ibid*, s 18(b).

concerned with removing the offence-related property from continued circulation in the criminal underworld. Again, this is a separate and distinct purpose from what the Court in *Grant* was referring to when it articulated the new approach to 24(2). Further, the Minister of Public Safety and Solicitor General of British Columbia made the following comments about the Act's purpose during its second reading:

With this new legislation we will be taking the profit out of illegal activity. It will be another tool to deter and prevent fraud, theft and a host of other illegal activities, and it will enable the recovery of ill-gotten gains and will assist in providing compensation to eligible victims.

The moneys recovered through forfeiture will compensate eligible victims and will be used to support further crime prevention initiatives. The moral and legal underpinnings of civil forfeiture are very clear. Civil forfeiture is similar to the civil remedy against unjust enrichment. It takes back assets derived from illegal conduct. No one should be allowed to get rich as a result of breaking the law. No one, I hope, can or will seriously argue that point.<sup>199</sup>

The British Columbia Court of Appeal also found the policy rationale for the Act was to:

- (1) to take the profit out of unlawful activity;
- (2) to prevent the use of property to unlawfully acquire wealth or cause bodily injury; and
- (3) to compensate victims of crime and fund crime prevention and remediation.<sup>200</sup>

Similarly, under section 2 of Manitoba's civil forfeiture act, *The Criminal Property Forfeiture Act*, the stated purpose is to provide civil remedies that will prevent:

- (a) people who engage in unlawful activities and others from keeping property that was acquired as a result of unlawful activities; and
- (b) property from being used to engage in certain unlawful activities.<sup>201</sup>

The distinct purpose of forfeiture hearings and the absence of any risk to an individual's jeopardy support a modified approach to the *Grant* test in the context of civil forfeiture hearings.

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<sup>199</sup> *British Columbia, Legislative Assembly, Hansard*, 38th Parl, 1st Sess, Vol 2, No 9 (19 Oct 2005) at 948 <[www.leg.bc.ca/documents-data/debate-transcripts/38th-parliament/1st-session/20051019pm-Hansard-v2n9#bill13-2R](http://www.leg.bc.ca/documents-data/debate-transcripts/38th-parliament/1st-session/20051019pm-Hansard-v2n9#bill13-2R)>.

<sup>200</sup> *British Columbia (Director of Civil Forfeiture) v Onn*, 2009 BCCA 402 at para 14.

<sup>201</sup> *The Criminal Property Forfeiture Act*, CCSM, c C306, ss 2(a) and (b).

## B. A Modified Approach to *Grant*

When the SCC articulated the new approach to 24(2) in *Grant*, it also held that there are no overarching rules that dictate the balancing act required of judges during their analysis.<sup>202</sup> The SCC also went on to acknowledge that mathematical precision is “obviously not possible” when weighing the different factors.<sup>203</sup> As a result, the question becomes how the *Grant* test should be applied in the civil process.

In a recent decision by the BC Court of Appeal regarding bifurcation of civil forfeiture issues, the court mentioned the possibility that the test could be modified to reflect the policy objectives of forfeiture legislation.<sup>204</sup> Modifying the application of the *Grant* test would not constitute a serious unprecedented shift in the law.

Historically, courts have adopted and applied tests of a different legal nature on several occasions, sometimes reducing down the requirements in the process. In *Doré*, the SCC held that a modified version of the *Oakes* test was to be applied in administrative law proceedings where discretionary administrative decisions were made. Such an approach was considered more flexible to meet the needs of administrative law rather than a full section 1 analysis.<sup>205</sup> Similarly, the SCC has drawn on legal tests from various areas of the law that did not necessarily coincide with the case it was attempting to resolve. Consider *Dagenais v. Canadian Broadcasting Corp.*, where the SCC dealt with the issue of a publication ban concerning one of the Canadian Broadcasting Corporation’s television shows.<sup>206</sup>

In that case, Mr. Dagenais and his co-accused were members of the Catholic order who were on trial for the physical and sexual abuse of young Catholic schoolboys.<sup>207</sup> The Canadian Broadcasting Corporation wanted to air its television series *The Boys of St. Vincent*, a fictional television program that depicted the alleged offences that Mr. Dagenais and his co-accused were charged with.<sup>208</sup> The SCC created a two-part test to determine when a publication ban should be ordered.<sup>209</sup> That same test was

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<sup>202</sup> *Grant*, *supra* note 18 at para 86.

<sup>203</sup> *Ibid.*

<sup>204</sup> *British Columbia (Director of Civil Forfeiture) v Conrad*, 2024 BCCA 10 at para 115. The BC Court of Appeal approved of *Squire*, *supra* note 150, at paras 112-114 of the decision, but also noted that “the jurisprudence on the exclusion of evidence in civil forfeiture proceedings pursuant to s. 24(2) of the Charter is not, as of yet, well developed.”

<sup>205</sup> *Doré v Barreau du Québec*, 2012 SCC 12 at paras 33-43.

<sup>206</sup> See generally *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835.

<sup>207</sup> *Ibid* at 836-837.

<sup>208</sup> *Ibid* at 851-852.

<sup>209</sup> *Ibid* at 878.

subsequently adopted in *R v Mentuck*, a criminal case in which the Crown sought to prohibit the publication of certain facts it intended to introduce as evidence during the trial.<sup>210</sup> In particular, the Crown brought a motion to ban the publication of:

- (a) the names and identities of the undercover police officers [involved] in the investigation of the accused, including any likeness of the officers, appearance of their attire and physical descriptions;
- (b) the conversations of the undercover operators in the investigation of the accused to the extent that they disclose the matters in paragraphs (a) and (c);
- (c) the specific undercover operation scenarios used in investigation. . . .<sup>211</sup>

Other courts have taken similar approaches in borrowing legal tests from areas of law outside the case they were trying to decide. The legal test of injunctions from *RJR-MacDonald* is another leading example of when courts have adapted and applied a test to a different legal setting. In *RJR-MacDonald*, an injunction was sought by the tobacco company to temporarily abstain from complying with the packaging and warning requirements mandated under the *Tobacco Products Control Act* while the substantive legal matter was being litigated.<sup>212</sup>

Yet, in *Manitoba Federation of Labour et al. v. The Government of Manitoba*, the Manitoba Court of Queen's Bench applied the same interlocutory injunction test in the labour sphere.<sup>213</sup> The Manitoba Federation of Labour sought an injunction against the Government of Manitoba in relation to an employment dispute, and, as such, the *RJR-MacDonald* test was appropriately used to resolve the Federation's application.

In adapting a legal test, courts can exercise their discretion to vary the amount of weight and emphasis given to each aspect of the test in their analysis. This was the approach taken by the trial judge in *Vellone*.<sup>214</sup> Recall that during Mr. Vellone's criminal trial, the judge found the first two factors of the *Grant* test favoured exclusion and declined to admit the evidence.<sup>215</sup> Yet, when the analysis was conducted again during the forfeiture hearing, she admitted the evidence because she placed greater emphasis on society's interest in the adjudication of the matter on its merits.<sup>216</sup> She was persuaded by an abundance of case law on how the

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<sup>210</sup> See generally *R v Mentuck*, 2001 SCC 76.

<sup>211</sup> *Ibid* at para 6.

<sup>212</sup> See generally *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311.

<sup>213</sup> See generally *Manitoba Federation of Labour et al v The Government of Manitoba*, 2018 MBQB 125.

<sup>214</sup> *Vellone*, *supra* note 45.

<sup>215</sup> *Ibid* at paras 61-62.

<sup>216</sup> *Ibid*.

integrity of the justice system would be brought into disrepute by returning offence-related property.<sup>217</sup>

Similarly, the case of *R v Breton* offers further support for the re-interpretation of the *Grant* test during a forfeiture hearing.<sup>218</sup> In that case, the Court excluded all of the evidence under section 24(2) and acquitted Mr. Breton at trial after it found his section 8 *Charter* rights were violated.<sup>219</sup> However, the impugned evidence was subsequently admitted when the Crown brought an application to seek forfeiture of the 1.2 million dollars of cash that was seized during the illegal search.<sup>220</sup> In reaching its decision, the Court was persuaded by the Crown's argument that section 24(2) can be revisited during a forfeiture hearing. The Court reasoned that a forfeiture hearing constitutes a change in the jeopardy for the accused that allows for a new section 24(2) analysis to be conducted, citing *Vellone* as persuasive.<sup>221</sup>

As with *Vellone*, the Court in *Breton* found a distinction between the interests of an accused and their property when the determination of guilt and deprivation of liberty are no longer in question.<sup>222</sup> Similar to *Vellone*, the focus was on removing potential offence-related property out of circulation.<sup>223</sup> Specifically, the inquiry was about the operation of sections 463.43 and 490(9) of the *Code*.<sup>224</sup> Those sections of the *Criminal Code* direct the Court to consider whether the impugned property was unlawfully possessed when it was seized.<sup>225</sup> In *Breton*, the Court held that society has a right to consider whether the property was unlawfully held and, if so, whether to allow the unlawful possession to continue.<sup>226</sup>

In re-conducting its *Grant* analysis, the Court held that the weight attributed to each branch of the test at trial was influenced by the context of the trial. However, the Court re-evaluated the test based on the circumstances of the forfeiture hearing, where the accused's liberty is no longer at risk.<sup>227</sup> Although the first two branches of the test still militated in favour of exclusion, the third and final branch of the test involving the repute of the administration of justice led to a different outcome. Rather

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<sup>217</sup> *Ibid.*

<sup>218</sup> See generally *R v Breton*, 2023 ONSC 2035.

<sup>219</sup> *Ibid* at paras 3-4.

<sup>220</sup> *Ibid* at paras 4, 5, 34.

<sup>221</sup> *Ibid* at paras 14, 16, 17.

<sup>222</sup> *Ibid* at para 9.

<sup>223</sup> *Ibid* at para 10.

<sup>224</sup> *Ibid* at para 22.

<sup>225</sup> *Ibid* at para 23.

<sup>226</sup> *Ibid* at para 23.

<sup>227</sup> *Ibid* at para 26.

than exclude the evidence again, the Court found that doing so would bring the administration of justice into disrepute.<sup>228</sup> The Court held that the 1.2 million dollars that was seized could be used in ways that would endanger the public and harm society.<sup>229</sup> Accordingly, the Court found society had a vested interest in the adjudication of whether Mr. Breton lawfully possessed the cash and admitted the evidence.<sup>230</sup>

## VI. CONCLUSION

In summary, there have been numerous attempts to undermine civil forfeiture proceedings that involved the use of the *Charter* and common law principles. Some of these efforts have been more successful than others in establishing a *Charter* breach where the court had to turn to the remedial provisions of the *Charter*. In *Squire*, the Court excluded the improperly obtained evidence under section 24(2), finding the defendant's section 8, 9 and 10(b) *Charter* rights were violated. By contrast, in *Vellone*, the evidence was initially excluded at the prosecution of his criminal charges, but was subsequently admitted during the forfeiture hearing despite upholding the *Charter* violation. This has led to the question of whether the *Grant* test can be horizontally adopted across criminal and civil proceedings, or if a remedy is more appropriately found under forfeiture legislation.

Civil forfeiture acts contain their own relief provisions that permit a judge to oppose granting the forfeiture sought. However, it must be remembered that section 24(2) is the remedial provision in the *Charter* and the extent of a *Charter* breach is not simply reduced as a result of a change in the procedural formality by which the state opts to commence the proceedings.<sup>231</sup> Whether the matter is tried civilly or criminally, the state misconduct that led to the improperly obtained evidence remains equally as egregious.<sup>232</sup> The question then becomes how the *Grant* test should be applied in determining the admissibility of such evidence. Within the civil forfeiture context, the court should take a modified approach by exercising its discretion to emphasize the importance of some factors over others. Some courts have adopted to take this approach, while others simply applied *Grant* without taking into account the differences that exist between civil and criminal proceedings.

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<sup>228</sup> *Ibid* at para 30.

<sup>229</sup> *Ibid*.

<sup>230</sup> *Ibid* at paras 30, 34.

<sup>231</sup> *Squire*, *supra* note 150 at paras 63-64.

<sup>232</sup> *Ibid*.



Clarifying instructions from the SCC on the correct approach to take would assist lower level courts in navigating this situation. However, such guidance is far from imminent. In March 2021, the SCC refused to grant Mr. Vellone leave to appeal his matter.<sup>233</sup> If, however, the matter was granted leave, the SCC could very well have resolved the matter in both criminal and civil forfeiture proceedings simultaneously. In *R v Hills*, the SCC endorsed the use of hypotheticals in a sentencing hearing, permitting the sentencing judge to rule based on hypothetical facts.<sup>234</sup> The SCC could likewise clarify this area of the law if presented with an opportunity to do so by using a hypothetical scenario and inviting counsel and other interested parties to make submissions on the matter.

Until the SCC provides a definitive ruling on how to traverse this area of the law, future research endeavours should consider examining the impact of the exclusion of evidence under section 24(2) in civil forfeiture proceedings. In particular, once this area of the common law develops, future research might consider how the Director could succeed despite an unfavourable section 24(2) ruling. Stated differently, researchers could examine whether a civil claim ends once the evidentiary basis collapses due to the exclusion of evidence under section 24(2).

Although the answer may appear intuitive, the data could suggest the exclusion of evidence under section 24(2) is a moot point in most cases. Recall that civil forfeiture proceedings are commenced *in rem* against the property itself and are assessed on the civil standard of proof of on a balance of probabilities. As such, the Director may have sufficient evidence that survives the section 24(2) ruling to prove its claim. Whether the common law developments in this fashion remains to be seen, in the meantime, it is clear that section 24(2) and a modified *Grant* test should be used to resolve issues of improperly obtained evidence in civil forfeiture proceedings.

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<sup>233</sup> *Roberto Vellone v Her Majesty the Queen*, 2021 CanLII 15594.

<sup>234</sup> See generally *R v Hills*, 2023 SCC 2.

Appendix A

**Comparison of Civil Forfeiture Regimes across Canadian Provinces\***

	BC	AB	SK	MB
ACT	<i>Civil Forfeiture Act, SBC 2005, C. 29</i>	<i>Civil Forfeiture Act, SA 2001, c C-15.2</i>	<i>The Seizure of Criminal Property Act, 2009, SS 2009, c S-46.002</i>	<i>The Criminal Property Forfeiture Act, C.C.S.M. c. C306</i>
CIVIL FORFEITURE PROVISIONS	<p>3 (1) The director may apply to the court for an order forfeiting to the government</p> <p>(a) the whole of an interest in property that is proceeds of unlawful activity, or</p> <p>(b) the portion of an interest in property that is proceeds of unlawful activity.</p> <p>(2) The director may apply to the court for an</p>	<p>19.2(1) Subject to subsection</p> <p>(2), the Minister may, with respect to property that is alleged to be an instrument of illegal activity, commence an action under this Part by an application for any one or more of the following purposes:</p> <p>(b) to remove financial incentives to commit illegal acts, including disgorging financial gains from illegal acts;</p> <p>(c) to prevent property that</p>	<p>3(1) The director may apply to the court for a forfeiture order if the director is satisfied that property is proceeds of unlawful activity or an instrument of unlawful activity.</p>	<p>3(1) If the director is satisfied that property is proceeds of unlawful activity or an instrument of unlawful activity, he or she may commence proceedings in court seeking an order forfeiting the property to the government.</p>

	BC	AB	SK	MB
	order forfeiting to the government property that is an instrument of unlawful activity.	has been used or is likely to be used in carrying out an illegal act from being used to carry out future illegal acts;		
<b>ADMIN. PROVISIONS</b>	<p><b>Part 3.1 – Administrative Forfeiture of Subject Property</b></p> <p>14.02 (1) This Part applies if</p> <p>(a) the director has reason to believe that</p> <p>(i) the whole or a portion of an interest in property, other than real property, is proceeds of unlawful activity, or</p> <p>(ii) property, other than real property, is an instrument of</p>	<p><b>Administrative disposition proceeding</b></p> <p>1.3(1) In this section, “bona fide interest holder” means, in relation to property described in subsection (2)(a), a person who has an interest in the whole or a portion of the property in respect of which the person has registered a financing statement in the Personal Property Registry, and who</p> <p>(a) did not</p>	<p><b>PART II.1 Administrative Forfeiture Proceedings</b></p> <p>10.2(1) The director may commence administrative forfeiture proceedings against property if:</p> <p>(a) the director is satisfied that the property is proceeds of unlawful activity or an instrument of unlawful activity;</p> <p>(b) the property is personal property;</p>	<p><b>Property eligible for administrative forfeiture</b></p> <p>17.2(1) Property may be the subject of administrative forfeiture proceedings under this Part if</p> <p>(a) it is cash or other personal property;</p> <p>(b) it has been seized by a law enforcement agency and is being held by or on behalf of that agency;</p>

	BC	AB	SK	MB
	<p>unlawful activity,</p> <p>(b) the director has reason to believe that the fair market value of the property referred to in paragraph (a) (i) or (ii) is \$75 000 or less,</p> <p>(c) the property referred to in paragraph (a) (i) or (ii) is in British Columbia and is in the possession of a public body, and</p> <p>(d) the director has no reason to believe that there are any protected interest holders in relation to that property.</p>	<p>directly or indirectly engage in the carrying out of the illegal act that is the basis for disposal under this Act, or</p> <p>(b) where the property had been acquired subsequent to the acquisition of the property by illegal means, did not know and would not reasonably be expected to know that the property had been acquired by illegal means.</p> <p>(2) The Minister may commence an administrative disposition proceeding under this Part with respect to personal property without having to commence a legal action</p>	<p>(c) the property has been seized by a law enforcement agency and is being held by or on behalf of that agency;</p> <p>(d) the director has reason to believe that the fair market value of the property is less than the prescribed amount;</p> <p>(e) subject to subsection (1.1), no other person has a prior registered interest in the property; and</p> <p>(f) the property is not the subject of an application for a forfeiture order pursuant to Part II.</p>	<p>(c) the director has reason to believe that the fair market value of the property does not exceed</p> <p>(i) the prescribed amount, or</p> <p>(ii) if no amount is prescribed, \$75,000;</p> <p>(d) all persons who have a prior registered interest in the property consent in writing to proceedings under this Part; and</p> <p>(e) the property is not the subject of proceedings seeking a forfeiture</p>

	BC	AB	SK	MB
	(2) This Part does not apply to property described in subsection (1) of this section if	<p>under Part 1.01 or Part 1.1 if</p> <p>(a) the Minister has reason to believe that the property is property acquired by illegal means or is an instrument of illegal activity,</p> <p>(b) the Minister has no reason to believe that there are any bona fide interest holders with respect to the property, and</p> <p>(c) the property is located in Alberta and is in the possession of a public body.</p>	<p><b>Notice to interested persons</b></p> <p>10.3(1) The director must give written notice of administrative forfeiture proceedings against the subject property to:</p> <p>(a) the person from whom the subject property was seized;</p> <p>(b) the law enforcement agency that seized the subject property; and</p> <p>(c) any other person who the director believes may have an interest in the subject property.</p> <p>(2) A notice pursuant to</p>	order under Part 2.

	BC	AB	SK	MB
			<p>this section must include the following:</p> <p>(a) a description of the subject property;</p> <p>(b) the date the subject property was seized and the place of seizure;</p> <p>(c) the basis on which the director seeks forfeiture of the subject property;</p> <p>(d) a statement that the subject property may be forfeited to the Crown;</p> <p>(e) a statement that a person who intends to oppose forfeiture of the subject property must submit a written notice of dispute to</p>	

	BC	AB	SK	MB
			the director at an address set out in the notice by a deadline date specified in the notice;	
UNLAWFUL ACTIVITY DEFINITION	<p>Part 1 Interpretation</p> <p>"unlawful activity" means an act or omission described in one of the following paragraphs:</p> <p>(a) if an act or omission occurs in British Columbia, the act or omission, at the time of occurrence, is an offence under an Act of Canada or British Columbia;</p> <p>(b) if an act or omission occurs in another</p>	<p>A reference in this Act to an illegal act is a reference to any of the following:</p> <p>(a) anything done or carried out in contravention of, or that constitutes an offence under, an enactment of Canada;</p> <p>(b) anything done or carried out in contravention of, or that constitutes an offence under, an enactment of Alberta;</p> <p>(c) anything done or carried out in contravention of, or that</p>	<p>PART I Interpretation 2 In this Act:</p> <p>(u) "unlawful activity" means an act or omission that is an offence pursuant to:</p> <p>(i) an Act, an Act of any province or territory of Canada or an Act of the Parliament of Canada; or</p> <p>(ii) an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence pursuant to an Act or an Act</p>	<p>"unlawful activity" means an act or omission that is an offence under</p> <p>(a) an Act of Canada, Manitoba or another Canadian province or territory; or</p> <p>(b) an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence under an Act of Canada or Manitoba if it were committed in Manitoba;</p>

	BC	AB	SK	MB
	<p>province of Canada, the act or omission, at the time of occurrence,</p> <p>(i) is an offence under an Act of Canada or the other province, as applicable, and</p> <p>(ii) would be an offence in British Columbia, if the act or omission had occurred in British Columbia;</p> <p>(c) if an act or omission occurs in a jurisdiction outside of Canada, the act or omission, at the time of occurrence,</p> <p>(i) is an offence under</p>	<p>constitutes an offence under, an enactment of another province or territory of Canada;</p> <p>(d) anything done or carried out in contravention of, or that constitutes an offence under, an enactment of a foreign jurisdiction if the thing would have constituted an offence under an enactment of Canada or Alberta had it occurred in Alberta.</p>	<p>of the Parliament of Canada if it were committed in Saskatchewan;</p>	<p>whether the act or omission occurred before or after the coming into force of this Act.</p>



	BC	AB	SK	MB
	<p>an Act of the jurisdiction, and</p> <p>(ii) would be an offence in British Columbia, if the act or omission had occurred in British Columbia,</p> <p>but does not include an act or omission that is an offence</p> <p>(d) under a regulation of a corporation, or</p> <p>(e) under an enactment of any jurisdiction if the enactment or the jurisdiction is prescribed under this Act.</p> <p>(2) For the purpose of</p>			

	BC	AB	SK	MB
	the definition of "proceeds of unlawful activity", "equivalent in value" means equivalent in value as determined or established by the regulations.			

	ON	QB	NS	NB
ACT	<i>Civil Remedies Act, 2001, S.O. 2001, c. 28</i>	<i>C-52.2 - Act Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity</i>	<i>Civil Forfeiture Act S.N.S. 2007, c. 27</i>	<i>Civil Forfeiture Act, SNB 2010, c C-4.5</i>
CIVIL FORFEITURE PROVISIONS	<p><b>Forfeiture order</b></p> <p>8 (1) In a proceeding commenced by the Attorney General, the Superior Court of Justice shall, subject to subsection (3) and except where it would clearly not be in the interests of justice, make an order forfeiting property that is in Ontario to the Crown in right of Ontario if the court finds that the property is an instrument of unlawful activity.</p>	<p><b>Civil Forfeiture of Proceeds and Instruments of Unlawful Activity</b></p> <p>4. The Attorney General may apply to a court of civil jurisdiction for forfeiture to the State of any property that is in whole or in part directly or indirectly derived from or used to engage in unlawful activity.</p> <p>The Attorney General may also file an incidental application requesting the court to declare rights in the</p>	<p><b>Application for forfeiture order</b></p> <p>5 (1) The Manager may apply to the court for an order forfeiting to Her Majesty in right of the Province</p> <p>(a) the whole of an interest in property that is proceeds of unlawful activity; or</p> <p>(b) the portion of an interest in property that is proceeds of unlawful activity.</p>	<p><b>Attorney General may commence proceedings</b></p> <p>5(1)The Attorney General may commence a proceeding in court for an order forfeiting to the Crown in right of the Province property that is alleged to be proceeds of unlawful activity or an instrument of unlawful activity, or both.</p>

	ON	QB	NS	NB
		property unenforceable because they are of a fictitious or simulated nature or because they were acquired out of the proceeds of unlawful activity	(2) The Manager may apply to the court for an order forfeiting to Her Majesty in right of the Province property that is an instrument of unlawful activity.	

	ON	QB	NS	NB
<b>ADMIN. PROVISIONS</b>	<p>Grounds to seek administrative forfeiture</p> <p>(2) The Attorney General may commence an administrative forfeiture proceeding against property if he or she has reason to believe that the property is proceeds of unlawful activity or an instrument of unlawful activity. 2020, c. 11, Sched. 3, s. 1 (1).</p> <p>Section Amendments with date in force (d/m/y)</p> <p>Commencing administrative forfeiture proceeding</p> <p>1.3 (1) In order to commence an</p>	N/A	N/A	N/A

	ON	QB	NS	NB
	<p>administrative forfeiture proceeding, the Attorney General must,</p> <p>(a) file notice of the administrative forfeiture proceeding against the property in the registration system established under the Personal Property Security Act; and</p> <p>(b) give written notice of the administrative forfeiture proceeding to,</p> <p>(i) the person from whom the property was seized,</p> <p>(ii) the public body that is holding the property or on whose behalf</p>			

	ON	QB	NS	NB
	<p>the property is being held, and</p> <p>(iii) any other person whom the Attorney General has reason to believe may have an interest in the property.</p> <p>2020, c. 11, Sched. 3, s. 1 (1).</p>			
<b>UNLAWFUL ACTIVITY</b>	<p>An act or omission that,</p> <p>(a) is an offence under an Act of Canada, Ontario or another</p>	<p>An act or omission that is an offence under the Criminal Code (R.S.C. 1985, c. C-46), the Controlled Drugs and</p>	<p>3 (1) In this Act,</p> <p>(m) "unlawful activity" means an act or omission described in</p>	<p>The following definitions apply in this Act.</p> <p>“unlawful activity”</p>

	ON	QB	NS	NB
	<p>province or territory of Canada, or</p> <p>(b) is an offence under an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence under an Act of Canada or Ontario if it were committed in Ontario,</p> <p>whether the act or omission occurred before or after this Part came into force.</p>	<p>Substances Act (S.C. 1996, c. 19) or the Cannabis Act (S.C. 2018, c. 16) is unlawful activity for the purposes of this Act.</p> <p>A penal offence under an Act listed in Schedule 1 is also unlawful activity for the purposes of this Act.</p> <p>This Act applies to property that is in Québec. It is applicable to unlawful activity committed in Québec and to unlawful activity engaged in outside Québec that would also be unlawful activity if engaged in in Québec.</p>	<p>one of the following subclauses:</p> <p>(i) where an act or omission occurs in the Province, the act or omission, at the time of occurrence, is an offence under an Act of the Parliament of Canada or of the Province,</p> <p>(ii) where an act or omission occurs in another province of Canada, the act or omission, at the time of occurrence,</p> <p>(A) is an offence under an Act of the Parliament of Canada or of the other</p>	<p>means an act or omission (activité illicite)</p> <p>(a) that occurs in the Province if, at the time of occurrence, the act or omission is an offence under an Act of the Legislature or an Act of the Parliament of Canada;</p> <p>(b) that occurs in another province of Canada if, at the time of occurrence, the act or omission</p> <p>(i) is an offence under an Act of the Parliament of Canada or under an Act of the</p>



	ON	QB	NS	NB
			<p>province, as applicable, and</p> <p>(B) would be an offence in the Province if the act or omission had occurred in the Province,</p> <p>(iii) where an act or omission occurs in a jurisdiction outside of Canada, the act or omission, at the time of occurrence,</p> <p>(A) is an offence under an Act of that jurisdiction, and</p> <p>(B) would be an offence in the Province if the act or omission had occurred in the Province,</p> <p>but does not include an act</p>	<p>other province, and</p> <p>(ii) would be an offence in the Province if the act or omission had occurred in the Province;</p> <p>(c) that occurs in a jurisdiction outside Canada if, at the time of occurrence, the act or omission</p> <p>(i) is an offence under an Act of the jurisdiction, and</p> <p>(ii) would be an offence in the Province if the act or omission had occurred in</p>

	ON	QB	NS	NB
			or omission that is an offence under an enactment of any jurisdiction if the enactment or the jurisdiction is prescribed under this Act.	the Province; but does not include an act or omission prescribed by regulation.

\*Prince Edward Island and Newfoundland do not have civil forfeiture legislation at the time of writing.